Petition

81-5523

NO._____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PAUL RUIZ & EARL DENTON.....PETITIONERS

vs.

STATE OF ARKANSAS.....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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Petitioners, Paul Ruiz and Earl Denton, prisoners under sentence of death, petition this Court for a Writ of Certiorari to the Supreme Court of Arkansas to review the convictions and sentences that were affirmed by that Court.

QUESTIONS PRESENTED

I. WHETHER THE DEATH SENTENCES IMPOSED UPON PETITIONERS CAN STAND UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS SET FORTH IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

II. WHETHER A CAPITAL DEFENDANT IS ENTITLED TO DUE PROCESS SAFEGUARDS, INCLUDING TRIAL BY AN IMPARTIAL JURY, DURING THE PENALTY PHASE OF A CAPITAL TRIAL, AND TO ASSURE SUCH A TRIAL BY BEING PERMITTED TO VOIR DIRE THE JURY PRIOR TO PENALTY?

OPINION BELOW

The opinion of the Supreme Court of Arkansas affirming the convictions and sentences of petitioners is set out in the Appendix since it has not been officially reported. (A 1-11). The unofficial citation is Ruiz v. State, ___Ark.___, 618 S.W.2d 3 (June 15, 1981).

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JURISDICTION

The judgment of the Supreme Court of Arkansas was set out in an opinion rendered on June 8, 1981. Petitioners filed a timely petition for rehearing in that Court. This petition was denied by letter order dated July 6, 1981. (A-12) Petitioners, after obtaining a stay of execution from the Supreme Court of Arkansas, were granted an extension of time in which to file this petition by the Honorable Harry A. Blackmun sitting as Circuit Justice. (A-14). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), with petitioners asserting that they have been deprived of rights guaranteed them by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved have been set out in the appendix to this petition. These include the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Ark.Stat.Ann. §§ 41-1301,1302; 1501;1502 (Repl. 1977). See Appendix 15-17.

STATEMENT OF THE CASE

This petition is from appeals of the second trial of this matter. The case involves the killing of a town marshall and wounding of a park ranger on June 29, 1977, and the killing of another park ranger whose body was found two days after the first incident. Petitioners were charged with these offenses, convicted, and sentenced to death by electrocution.

The first trial in this matter was reversed because the prejudicial, pretrial publicity made it impossible for petitioners to receive a fair trial. Ruiz v. State, 265 Ark. 875, 582 S.W.2d 915 (1979). There the Court stated that "Perhaps no episode in the history of Arkansas received more publicity than the one involved in this case." Ruiz v. State, 265 Ark. at 886, 582 S.W.2d at 920.

Upon remand the case was removed to the furthermost county within the same judicial district from the scene of the crime. New counsel were appointed to represent petitioners and the newly elected prosecuting attorney and his staff prepared the case for the State.

The episode occurred between June 29-July 1, 1977. Petitioners were escapees from the Oklahoma State Penitentiary at McAlester and were reported missing on June 23, 1977. Six days later they were alleged to have been seen near Magazine, Arkansas. Sometime that morning (June 29), the town marshall--Marvin Ritchie--was reported missing. A search for him began. Meanwhile, two park rangers--Opal James and David Small--were working in the area. They were stopped by the marshall's car and two armed men ordered them into the marshall's car.

All three of the men had their billfolds taken from them. Small also had a watch taken from him. Ritchie and Small were ordered to get into the trunk of the car handcuffed. After their shirts were removed they were shot by the two men, and the trunk of the car was closed. Ritchie died from wounds to his head, but Small survived a gunshot wound to the chest. They were found later that afternoon by the search parties.

James' body was found two days later in another county. He died of a gunshot wound to the head.

Petitioners were arrested in Portland, Oregon, several days later. Although photographic line-up procedures had failed to produce a positive identification of them, several witnesses were able to identify them at trial as the persons seen in the Magazine area. Fingerprints and ballistics examinations served as the basis for a circumstantial case to support the identifications. As mentioned previously, this case had received a tremendous amount of publicity.

Prior to trial petitioners had moved to have the charges reduced to murder in the first degree because of the overlapping language in the capital murder and first degree murder statutes. Motions were also made during trial to permit a second voir dire of the jury prior to the penalty phase in order to assure that the jury could still consider both punishments possible under the Arkansas capital murder statute.

During the voir dire process prior to the guilt trial, petitioners challenged several rulings by the trial court excusing jurors that had a basic opposition to the death penalty. The Supreme Court of Arkansas rejected these arguments on appeal and relied upon the ability of the trial judge to view the potential juror in determining if a juror's answers on the death penalty were ambiguous.

Although numerous objections were raised at the second trial and on appeal, only those discussed below are the subject of this petition. The arguments were properly preserved in the trial court and before the Supreme Court of Arkansas. This petition is being timely filed. From the issues raised above, petitioners pray that this Court grant the petition for writ of certiorari, set this matter for oral argument, and permit counsel to fully brief the issues for the Court.

REASONS FOR GRANTING THE WRIT

1. Jurors were excluded from this jury in violation of the principles enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968). In affirming the conviction, the Supreme Court of Arkansas deferred to the trial court to determine the meaning of admittedly ambivalent answers. This Court should grant certiorari to determine

if the principles enunciated in Witherspoon are still good law, and if so, to determine if the jurors in this case were properly excused for cause in accordance with that standard. If the jurors were not properly excluded, this Court should set aside this death penalty as violative of the Eighth and Fourteenth Amendments to the United States Constitution.

2. The penalty phase of a capital case is a critical stage of the proceedings to which all due process rights of the defendant should attach. This includes the right to trial by a fair and impartial jury on the issue of penalty. If after hearing the evidence on guilt, the jury can no longer consider both possible punishments in a capital case, then the defendant is denied this fair trial right. This Court should grant certiorari to determine if a capital defendant is entitled to determine, by a second voir dire prior to penalty, if the jury sentencing him to death is still able to consider both penalties, and thus assure that any death penalty imposed by a capital jury is done so on the basis of reason and not caprice or emotion.

ARGUMENT

I. WHETHER THE DEATH SENTENCES IMPOSED UPON PETITIONERS CAN STAND UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS SET FORTH IN WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968).

Prior to Witherspoon v. Illinois, supra, death sentences were upheld even if imposed by juries composed in such a manner as to exclude those persons that had general objections to the death penalty. The Court held that a death penalty imposed under such circumstances could not stand.

The specific holding of the Court stated that if the jury imposing the death penalty excluded persons that simply voiced general objections to the death penalty, or expressed conscientious or religious scruples against its imposition, then such a death penalty could not be carried out. Witherspoon v. Illinois, 391 U.S. at 522.

It was further stated in a footnote to the opinion that the most that could be required of a juror is that they be willing to consider the imposition of the death penalty and not be irrevocably opposed to its imposition regardless of the facts and circumstances that might arise in the course of the proceedings. Witherspoon v. Illinois, 391 U.S. at 523, n. 21. The Court gave this footnote as the standard to be followed in later cases concerning this issue. Boulden v. Holman, 394 U.S. 478, 483 (1966); Maxwell v. Bishop, 398 U.S. 262 (1970).

Before a juror can be excused in a death case because of views on the death penalty, the juror must unambiguously state that he would automatically vote against the death penalty no matter what the trial might show. Anything less is not sufficient since it cannot be presumed that the juror is so opposed unless he states unambiguously that he is so opposed.

The Court has continued to uphold this doctrine, and has recently applied it to the bifurcated trial procedure. Adams v. Texas, 448 U.S. 38 (1980).

The specific question presented in this case is whether certan jurors were properly excluded from petitoners' jury. The underlying question, however, is whether the reviewing court is to defer to the trial court's ruling as to whether an answer is ambiguous. This Court has never directly answered this question. If the reviewing court is to answer the question and to apply the standard announced in Witherspoon, then no deference should be given to the trial court's ability to view the potential juror

during voir dire. In that instance, the death sentences imposed in this case should be vacated and the cause remanded.

This question arose shortly after Witherspoon was first decided. In a summary opinion, the Court indicated that deference to the trial court's position cannot be a basis for saving a death penalty when a juror has been improperly excluded. Aiken v. Washington, 403 U.S. 946 (1971), reversing State v. Aiken, 75 Wash.2d 421, 452 P.2d 232 (1969). Nor is the totality of the voir dire record supposed to be a basis for saving an improper exclusion under Witherspoon. Jaggers v. Kentucky, 403 U.S. 946 (1971), reversing Jaggers v. Commonwealth, 439 U.S. 580 (Ky.Ct.App. 1968).

In the instant case the answers of excluded jurors were clearly ambivalent. The Supreme Court of Arkansas, in addressing the issue, stated

> It is true that all [the excluded jurors complained about] were in some respects ambivalent in their responses, depending on how the question was phrased, however, in the end all three came short of meeting the test of Witherspoon....[Explanation added] Ruiz v. State, 618 S.W.2d at 10.

In order to see how "in the end," the answers were short of the test in Witherspoon, it is important to set out the voir dire here of one particular juror.

MS. EVERETT:	I could consider it but I could never vote for it.
MR. CAMBIANO:	Well, I'm not asking you--I'm not asking you how you would vote at that time. I'm just saying would you consider it?
ANSWER:	In other words, could I consider--
QUESTION:	The two alternatives, you know, you have two choices. Would you give consideration to both of them and not put your mind blank on one or the other. We wouldn't want you to go out and say, "My mind is made up for the death penalty only," or "My mind is made up for the life." We would want you to consider both choices if the Judge instructed you in that way. Could you do that?
ANSWER:	Yes.

The juror was then excused for cause. The Supreme Court of Arkansas affirmed.

This juror was clearly excused improperly. As such, this Court has held that one improper exclusion is the basis for setting aside a death penalty. Davis v. Georgia,429 U.S.122(1976).

Because of the Court's ruling in Adams v. Texas, supra, it is clear that the Witherspoon doctrine is still viable. Yet, despite efforts to inform trial courts, and state appellate courts of last resort, that jurors are being improperly excluded, the dockets continue to be unnecessarily conjested because of mistaken beliefs that the position of the trial judge in viewing certain answers will support a finding that ambiguous answers are unambiguous.

Petitioners feel that this Court should grant certiorari on this issue to determine the viability of the Witherspoon doctrine, and the manner in which it is to be applied. Further, petitioners state that the death penalties in this case should be set aside now, and this matter remanded for proceedings not inconsistent with a judgment vacating the death penalty.

II. WHETHER A CAPITAL DEFENDANT IS ENTITLED TO DUE PROCESS SAFEGUARDS, INCLUDING TRIAL BY AN IMPARTIAL JURY, DURING THE PENALTY PHASE OF A CAPITAL TRIAL, AND TO ASSURE SUCH A TRIAL BY BEING PERMITTED TO VOIR DIRE THE JURY PRIOR TO PENALTY?

The defendant in a criminal case is guaranteed trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145 (1968). Due process grounds have also be used to guarantee that the criminal defendant receives a fair trial by an impartial jury. See, e.g. Irvin v. Dowd, 366 U.S. 717 (1961).

In the present case it is clear that petitioners were given the opportunity to voir dire the jury prior to the guilt phase of the trial. However, in a capital case there are really two trials: one on the issue of guilt; one on the issue of penalty. Before reaching the penalty trial, the jury has already heard a considerable amount of information about the defendant. If the defendant is convicted of a capital offense, it is safe to assume that there is some prejudice by that jury against that defendant. The issue, then, in a death case is whether the defendant has a right to know through the voir dire process that that jury is able to fairly consider both sentencing alternatives as it enters the penalty phase.

Petitioners requested the opportunity to briefly voir dire the jury prior to penalty in this case. The sole purpose of that examination would have been on the issue of punishment. Because they were prohibited from having this limited voir dire, the reliability of the jury verdict of death is called into question. More specifically, it cannot be safely said that this death sentence was not the result of whim, caprice or emotion. Lacking the requisite reliability that should be required in death cases, the sentence should be set aside.

After this Court decided Furman v. Georgia, 408 U.S. 238 (1972), the States undertook to pass death penalty legislation that could withstand the pre-Furman shortcomings. One form of legislation that was developed to guide the jury's discretion in the sentencing process provided for a bifurcated trial. In the first part of the trial the jury would consider only the issue of guilt. If the defendant were found guilty, the jury would then consider aggravating and mitigating factors that may be present. Based upon this latter consideration, the jury would determine if the penalty would be death, or something less than death.

Arkansas, among other states, passed such legislation. The amended form of this legislation was in effect during petitioners' trial. Ark.Stat.Ann. §§ 41-1301, et seq (Repl. 1977). Once the decision as to guilt is made, the jury's punishment alternatives are limited to death by electrocution and life imprisonment without parole. Ark.Stat.Ann. § 41-1351 (Repl. 1977).

To impose a sentence of death by electrocution, the jury must determine three things: (1) that aggravating circumstances exist; (2) that these aggravating circumstances outweigh any mitigating circumstances that may be found to exist; (3) that these aggravating circumstances justify, beyond a reasonable doubt, the imposition of the death penalty. Ark.Stat.Ann. § 41-1302 (Repl. 1977).

Because of the required findings it is clear a jury must impose a sentence of life imprisonment if it fails to find aggravating circumstances, or that aggravating circumstances do not outweigh mitigating circumstances. However, it is also possible that the jury can find that despite first two findings, the death penalty is not justified beyond a reasonable doubt. Because of this, the defendant is entitled to have a jury that enters the penalty phase of the trial with an open mind as to punishment.

This Court has long noted that the death penalty is qualitatively different from any other sentence imposed. Gregg v. Georgia, 428 U.S. 153, 181-188 (Opinion of Stewart, Powell and Stevens, JJ.)(1976). It is important, then, that the action of the state taking the life of a citizen be, and appear to be, the result of reason and not of caprice or emotion. Gardner v. Florida, 430 U.S. 349, 358 (1977). In terms of the present case, the question is whether this jury entered the penalty phase with the same open mind as to penalty as it expressed having before the guilt phase. If not, the sentence is void. One way to have assured that the jury was open minded would have been to permit the limited voir dire on penalty requested by petitioners. Absent this questioning, it cannot be assumed that the jury was impartial.

As noted above, the Court wishes to have reliability in the death verdicts. Otherwise, such a verdict will be set aside. Although there is no provision for voir dire prior to penalty in other types of cases, the qualitative difference of the death penalty is such as to require such a voir dire particularly where, as here, it was timely requested by the petitioners.

The penalty phase of a capital case must satisfy due process requirements. Gardner v. Florida, 430 U.S. at 358. The Court has ruled that this includes, among other things, the right to counsel. Specht v. Patterson, 386 U.S. 605 (1967). The penalty phase should also satisfy due process rights to trial by an impartial jury, and should be afforded Sixth Amendment protections to trial by an impartial jury.

The Court has already recognized that the sentencing hearing in a death case is unlike that in noncapital cases. Indeed, jeopardy questions attach to the result of a sentencing hearing in a death

case. Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (May 4, 1981). The Court stated that many of the protections available to a defendant in a criminal trial are available at the sentencing hearing of a capital case. 101 S.Ct. 1862. The question posed here is whether that includes the right to trial by an impartial jury? If so, then the defendant should be permitted to voir dire that jury on the limited issue of penalty to determine if the jury is still open minded. It is not so important that the defendant personally voir dire the jury, what is important is that a determination be made for the record (perhaps by the trial court), that the jurors can state under oath that they can still follow the law.

The alternative is not only non-reliability of the death sentence, but it would require the shifting of the burden of proof guaranteed to protect the defendant. In other words, if the jury is biased it would enter the penalty phase requiring the defendant to prove that he should live, instead of the state having to prove that he should die. This Court is firmly dedicated to the proposition that a death penalty should be the appropriate punishment for a specific crime if it is to be imposed at all. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

In denying petitioners' argument that they were entitled to this limited voir dire, the Supreme Court of Arkansas stated only that the process would be disruptive. Ruiz v. State, 618 S.W.2d at 12. Mere disruption, however, is not a sufficient basis for denying capital defendants a fair trial on the ultimate penalty determination. In Gardner v. Florida, 430 U.S. at 359, the Court stated

> ...if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.

The disputed matter raised in this issue is whether capital defendants are entitled to trial by an impartial jury on the ultimate issue of punishment. The few minutes it would take to determine if the evidence had so biased the jury during guilt that it could not be fair during penalty would indeed be well spent if it made the difference between life and death.

The Court should grant certiorari on this issue to determine if Sixth and Fourteenth Amendments rights to a fair trial attach to the penalty phase of a capital case. If so, the Court should then determine if a capital defendant can be denied the opportunity to assure trial by an impartial jury through a voir dire process that would eliminate those persons from the jury that decided during the guilt phase of the trial they could not longer be fair and impartial on penalty.

CONCLUSION

For the foregoing reasons, petitioners' feel that this Court should grant certiorari, review the death sentences in this case, and vacate those sentences. In the alternative, petitioners' ask that this Court set this matter for oral argument to fully consider the issues raised herein.

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CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, counsel for petitioners herein, serving pro hac vice, and pro bono publico in this matter for said indigent petitioners, do hereby certify that a true and correct copy of the foregoing petition was served on opposing counsel this 3rd day of October, 1981, by mailing a copy of same to the Honorable Victra L. Fewell, Assistant Attorney General, Office of the Attorney General, Justice Building, Little Rock, Arkansas, 72201, with sufficient postage attached thereto.

Thomas M. Carpenter
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APPENDIX

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SUPREME COURT OF ARKANSAS

No. CR80-147

PAUL RUIZ and EARL VAN DENTON, Appellants v. STATE OF ARKANSAS, Appellee	Opinion Delivered June 8, 1981 APPEAL FROM LOGAN COUNTY CIRCUIT COURT, SOUTHERN DISTRICT HONORABLE CHARLES H. EDDY, Judge AFFIRMED.

STEELE HAYS, Associate Justice

Appellants were first convicted in Logan Circuit Court of crimes of capital murder in the June 29, 1977, robbery, kidnapping and shooting deaths of Marvin Ritchie and Opal James. The jury returned death sentences. On appeal, we reversed the trial court's denial of motions for a change of venue, pointing to the oppressive and unprecedented pre-trial publicity surrounding the crimes. Ruiz & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 915 (1979). On remand, the case was transferred to the Conway Circuit Court, the most distant in that judicial district. In the second trial, verdicts of guilt were again returned and in the penalty phase the jury found a number of aggravating factors, no mitigating factors and again imposed sentences of death by electrocution. This appeal is from the second convictions.

While serving life sentences, appellants escaped from the Oklahoma State Prison on June 23, 1977. On the morning of June 29 they were seen near the town of Magazine, in Logan County, parked along Scott Creek Road in a 1972 Ford automobile with a Louisiana license. The record is silent as to where or how, but sometime early that morning, the marshal of Magazine, Marvin Ritchie, came in contact with appellants. His shirt was taken from him and he was placed in the back of his car, his hands handcuffed behind his back. That same morning David Small and Opal James, employees of the Corps of Engineers, were working in the area of Blue Mountain Lake. Driving a Corps of Engineers' pickup truck, they met Marshal Ritchie's car on the road to Ashley Creek Park at

around 9 o'clock. The marshal's car drove across the road, blocking their path, and appellants got out of the car brandishing pistols. Paul Ruiz was wearing Marshal Ritchie's shirt. Small and James were robbed of their shirts and billfolds and put in the back seat of the car with Marshal Ritchie. Appellants asked about roads leading west, which of them kenw the area best, and were told Opal James. Appellants concealed the marshal's car in a drainage ditch and ordered Ritchie and Small into the trunk handcuffed together. Small's watch was taken from his wrist and one appellant said "you know what we've got to do." The other answered, "yes, I do." Two shots were fired, one into the brain of Marvin Ritchie, the other into the chest of David Small, and the trunk was closed.

At around 2:30 that afternoon a search party discovered the vehicle and opened the trunk to find Marvin Ritchie dead and David Small critically wounded, but alive and able to provide crucial testimony in trial. Two days later the truck and the body of Opal James were discovered in a wooded area north of Odon in Montgomery County, the body already badly decomposed. Death was caused by a single bullet through the head. The appellants were arrested on July 8, 1977, in Portland, Oregon. Additonal testimony, including ballistics and fingerprinting, further connected appellants and the crimes. Neither appellant testified.

On appeal, six instances of error by the trial court are alleged. They have been reviewed along with other objections as required by Rule 36.24, A. R. Crim. P. We find no reason to reverse.

Appellants first argue that the offenses should have been servered. They were charged under Ark. Stat. Ann. § 41-1501(1)(a) and 41-1501(1)(c) (Repl. 1977) with the deaths of two persons while committing robbery and kidnapping; they contend that there is insufficient evidence that these offenses occurred during the same criminal episode. The concede a similar point was raised in the first appeal, but they submit the issue

was presented differently then, i.e., whether the evidence was sufficient to support the contention that both murders occurred during the course of a single criminal episode. Whereas, the issue raised now is whether the offenses should have been severed for purposes of trial, there being no common scheme or plan. Granted, the new wording is altered slightly, and if the issue is now presented in a different context, it leaves the substance of the argument essentially unchanged. In either case, if the evidence supports a determination that both homicides occurred as a part of the same criminal episode, or were parts of a series of connected acts, then it was not incumbent on the trial court to grant a severance, and certainly not mandatory. The trial court had that discretion and its discretion was not abused.

We disagree that these two murders are not within a single criminal episode or a series of connected acts. Rule 21.1(b), A. R. Crim. P., permits the joinder of two offenses in one information when they are based on "a series of acts connected together...." All three men were taken prisoner within a brief period of time, robbed, kidnapped and transported some distance to the drainage ditch where Opal James witnessed the shooting of Marvin Ritchie and David Small, the latter surviving through no credit to the appellants. The fact that Opal James's death did not occur until later does not disconnect it from the entire episode, as it is plain that his death was deferred solely because he was needed to guide the appellants in unfamiliar territory. We find no greater merit in the argument now than before. In the earlier appeal, it was said:

> We fail to understand why appellants would seriously ask us to declare that the evidence in this case was insufficient to support the verdict rendered by the jury. The fact that Marvin Ritchie was killed on the morning of June 29, 1977, and that Opal James was killed 13 or 14 hours later, in Montgomery County or Scott County, does not prove that these two men were not killed in the same criminal episode.

Appellants invoke Rules of Crim. Proc., Rule 22.2(a) (1976):

> Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

They argue that the offenses are not part of a single scheme or plan. That assertion is debatable, but whether they were part of a single plan or simply random, disconnected crimes is beside the point, because they constitute one criminal episode and when a series of acts are connected that is enough to give the state a right to join them in a single information. Rule 21.1, supra.

The commentary to Rules 21, 22 and 23 states that they are designed "to promote expeditious disposition of criminal cases" without resulting in prejudice to the defendants and without unreasonably restricting the trial court's discretion in finding the right balance between the two opposing interests. (See Commentary, Article VI, Ark. Stat. Ann., Vol. 4, p. 488.) Rule 22.2, which appellants cite, gives an absolute right of severance when the offenses have been joined solely on the ground that they are of the same or similar character. (Commentary, p. 489.) Here, the offenses cannot be said to have been joined solely on that ground for the reasons we have stated, and the trial court properly declined to grant a severance.

Appellants refer to the dictum in Rowe v. State, 271 Ark. 20, 607 S.W.2d 657 (1980), though conceding a different context. Rowe involved the principle of double jeopardy, the issue being whether the conduct of the accused constituted a single offense as opposed to two offenses. That is not the question here, so no guidance is provided by the Rowe decision.

Secondly, it is urged that the court erred in excusing certain jurors for cause. The argument here is bi-fold, that three of the 21 jurors excused by the court because of opposition to the death penalty should not have been excused for cause under the precepts announced in Witherspoon v. Illinois, 391 U.S. 510 (1968) and in Boulden v. Holman, 394 U.S. 478 (1969), and that other jurors were improperly excused because of relational ties to a secretary of the prosecuting attorney. First, appellants earnestly submit that jurors Harold Scroggins, Jo Ann

Everett and James Moore did not demonstrate fixed opposition to the death penalty and, therefore, their dismissal by the court was not in keeping with Witherspoon, where it is held that conscientious or religious scruples against the death penalty are not disqualifying; a juror must indicate that he will automatically vote against it under any circumstances. We find these jurors gave a clear indication that they would not vote for death whatever the circumstances. It is true that all were in some respects ambivalent in their responses, depending on how the question was phrased, however, in the end all three came short of meeting the test of Witherspoon and Bjoulden, that in spite of conscientious scruples against capital punishment they would consider and even impose the death penalty depending on the circumstances. Appellants point out that each of the three expressed a willingness to "consider" death as a possible punishment and contend that this suffices. But all three qualified their responses by saying that they would not vote for the death penalty notwithstanding their willingness to consider it. To say that one would consider the death penalty but would not vote for it is nothing more than a play on words and fails the test of Witherspoon.

Appellants point to a "yes" answer by juror Everett when asked if she would consider both choices, life or death; but the question she was answering was expressly limited to whether she would merely "consider" the two options, as opposed to whether she could then vote on the basis of her consideration:

> A: I could consider it but I could never vote for it.
>
> Q: Well, I'm not asking you--I'm not asking you how you would vote at that time. I'm just saying would you consider it?
>
> A: In other words, could I consider--
>
> Q: --The two alternatives, you know, you have two choces. Would you give consideration to both of them and not put your mind bland on one or the other. We wouldn't want you to go out and say, "my mind is made up for the death penalty only," or "My mind is made up for the life." We would want you to consider both choices if the Judge instructed you in that way. Could you do that?
>
> A: Yes.

Ms. Everett made it clear by repeated answers that she drew a distinction between considering the death penalty and voting for the death penalty and that she would not vote for the death penalty "under any circumstances." Nor are we willing, as appellants urge, simply to take a single answer or even the last answer given by a juror to counsel, whose questions have a partisan slant, as determinative and final; we prefer to examine the overall inquiry, especially questions posed by the trial judge in keeping with Witherspoon as a surer guage of a juror's willingness to weigh all the penalties of the law against the evidence and vote accordingly. We have said several times since Witherspoon that the trial judge is in a better position to weigh the contradictions jurors often demonstrate when asked to say beforehand how they would vote on so profound an issue as life or death. Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980); McCree v. State, 266 Ark. 465, 585 S.W.2d 938 (1979). The questions and answers of the other two jurors are not essentially different and we believe the trial court was justified in excusing all three under Witherspoon.

The second phase of this point is that juror Joe Allison was excused by the court after having been accepted by both sides because it was learned that he was a cousin to a secretary of the prosecuting attorney. Two other jurors appear to have been excused for a similar reason. Appellants argue that neither Ark. Stat. Ann. § 39-105 (Repl. 1980) nor § 43-1920 (Repl. 1977) is applicable, the first dealing with kinship to a party or an attorney and the second dealing with a variety of relationships from which a bias might be implied. We can find no merit in the argument. The matter was brought to the trial court's attention by the prosecutor, as it should have been, on the assumption that for a cousin of one of his secretaries to serve on the jury would, at least, give the appearance of bias, especially in light of the fact that the secretary was expected to be frequently in the courtroom and actively involved in assisting the prosecutors. While the trial judge's

discretion is said to be limited to the issue of actual bias (Gammel v. State, 259 Ark. 96, 531 S.W.2d 474 (1976)), we are not willing to say he is without discretion to excuse a juror on his own where the issue of bias may be more implied than actual even though it does not fall clearly within the two statutes. It would be impossible for the statutes to cover every conceivable circumstance touching on a juror's possible bias. The court's discretion here was exercised in appellants' favor, as opposed to Henslee v. State, 251 Ark. 125, 471 S.W.2d 352 (1971), where employees of a company whose lands defendant was charged with burning were permitted to serve as jurors by the trial judge, resulting in a reversal. We said there: "not only should a trial be fair, it should also appear to be fair...." Here, the trial judge simply showed an abundance of caution by excusing jurors having the appearance of an implied bias favoring the prosecutor and we could not justify treating that as an abuse of discretion. The same issue was addressed in Strode v. State, 259 Ark. 859, 537 S.W.2d 162 (1976):

> Since a party is not entitled to have any particular juror, the erroneous rejection of a competent talesman is not prejudicial, in the absence of a showing that some biased or incompetent juror was thrust upon him.

No such showing was attempted here.

The next assertion of error deals with two black and white photographs, 8x10, which were received in evidence during the guilt phase of the trial. They show the body of Marvin Ritchie lying face down, partially handcuffed, in the trunk of the vehicle where he and David Small were shot. It is claimed the photographs are inflammatory and, beyond that, since the same jury heard both the guilt and penalty phases of trial, the jury was tainted by the introduction of the photographs in its penalty deliberations, a novel argument. This contention is built upon language in Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979), where, discussing the same proposition, we said that the introduction of photographs could not have prejudiced the accused in the penalty phase because the jury chose the lesser punishment, or life.

Here, the jury chose the death penalty. But that is dictum rather than precedent, and because that reasoning may have been correct in Gruzen in view of the outcome, does not mean that the reverse is true. The answer lies in the two photographs and we think the court committed no error in receiving them. They are of little evidentiary value, so far as we can observe, but they are relatively free of anything prejudicial. The wound is barely evident; no blood is visible; the face of Marshal Ritchie is not seen; even the posture of the body is relaxed and uncontorted. There is no trace of anything lurid or odious. In short, we find nothing that might be expected to arouse passion or prejudice. Further, it appears these same photographs were challenged in the first appeal and found not to be prejudicial.

Appellants claim that they should have been permitted to voir dire the jury between the guilt pahse and the penalty phase of the trial. Citing cases holding that due process requirements of the Constitution apply equally to the penalty pahse of a captial case, appellants maintain that a motion for a second voir dire of the jury should have been granted. It is urged that counsel needed to question the jurors to determine if they would consider both options open to them and could disregard evidence in the first pahse of the trial not relevant to the issues in the penalty phase. The argument has freshness, but we find nothing cited to support this thesis and as the appellee points out, it could serve no useful purpose except to prolong the trial in view of the language of Ark. Stat. Ann. § 41-1301(c) that the same jury shall sit in both stages of the trial. Upholding this argument would constitute a major disruption in the statutory scheme of capital trials under Arkansas law- a scheme we have approved in several past decisions. Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied 434 U.S. 878 (1977); Swindler v. State, 267 Ark. 418, 592 S.W.2d 91, cert.den., __U.S.__, 101 S.Ct.630 (1980), Besides the questions counsel regards as necessary could have been asked during the initial voir dire proceedings. So it cannot be said that our statutory scheme deprives counsel of the opportunity to ask all the questions he deems essential.

Appellants next submit that the jury ignored mitigating evidence presented during the penalty phase, so the death penalty was the result of passion or prejudice. Evidence was presented in the second pahse that both appellants suffered from character disorders which, it is said, might cause extreme pressures or emotional disturbance during the time the murders were committed. The second part of their equation is: since extreme emotional disturbance is one of the mitigating factors provided for in Ark. Stat. Ann. § 41-1304 (Repl. 1977), it follows that the jury disregarded that evidence, as shown by its failure to make a finding of any mitigating circumstances. The flaw in this premise lies in the argument itself- it is said that by finding no mitigating circumstance, the jury "completely disregarded" such evidence, while in the same breath conceding that it was not required to do so. But if the jury was not required to make such a finding, how can it be said the evidence was disregarded? It may have been disbelieved or it may have been seriously regarded and in the end rejected. For that matter, the only evidence of the presence of extreme emotional disturbance was the opinion testimony of two clinical psychologists that emotional pressures in certain situations typically accompany the disorders said to belong to these appellants. Their testimony was general and the jury was not required to accept opinion as fact, or even to conclude that what might be generally true, was specifically true of the appellants. Gruzen v. State, supra; Curry v. State, 271 Ark. 913, 611 S.W.2d 745 (1981). The gist of this same argument is dealt with and decided adversely in Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980) and Westbrook v. State, 265 Ark. 736, 580 S.W.2d 702 (1979 and cases cited there.

This brings us to appellants' final point. They argue that our capital felony murder statute, § 41-1501(1)(a) (Repl. 1977) and our first degree murder statute, § 41-1502(1)(a) are overlapping and, therefore, unconstitutionally vague. We recognized the overlapping in Cromwell v. State, 269 Ark. 104, 598 S.W.2d 73 (1980) and Martin v. State, 261 Ark. 80, 547 S.W.2d 81 (1977) concluding that some overlapping

is unavoidable:

> In the first place, it is impossible to avoid the use of general language in the definition of certain offenses. State v. Weston, 255 Ark. 567, 501 S.W.2d 622 (1973). Moreover, the prosecutor or grand jury is often compelled to choose one of two or more offenses, no matter how precise the statutes may be. For example, the conflicting testimony of eyewitnesses may, depending on their varying credibility, establish capital murder if the accused committed robbery but only murder in the first degree if he committed a lesser felony such as theft of property, battery or aggravated assault. §§ 41-2103, -2203, -1601, and -1604. There can be no constiutional objection to the exercise of a reasonable discretion in that situation. Cromwell, page 107.

We also concluded in Cromwell that the similarity of the wording of the two statutes could not have been unintentional in view of the long study given the criminal code by the drafting committee and the legislature and may have been intended to benefit the accused:

> The actual wording of the statute may have been chosen to lighten the possible punishment that might be imposed for conduct falling within the strict definition of capital murder -- a consequence that might be acceptable both to the prosecution and to the defense. If that is not true in a particular case, presumably the defense can ask that the State be required to elect between the two degrees. In any event, we find no constitutional infirmity in the overlapping of the two sections, because there is no impermissible uncertainty in the definition of the offenses. Cromwell, page 107.

This concept of our statute was re-examined in Wilson v. State, 271 Ark. 682, 611 S.W.2d 739 (1981), supplemental opinion delivered March 9, 1981, and reaffirmed on the same arguments raised in this appeal. Appellants cite Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 232 (1980) and Roberts v. Louisiana, 428 U.S. 325 (1976), which are of no avail, as our statutory scheme is not flawed as were those of Alabama and Louisiana. Under Alabama law the jury could not consider lesser included offenses in capital crimes and was limited to either an acquittal or a conviction, in which case death was mandatory, and, hence, the jury was deprived of the "third option" of a lesser punishment, which the United States Supreme Court held to be unconstitutional. In Roberts, Louisiana's statutory scheme was found

to be deficient. The jury in Louisiana was always instructed as to lesser included offenses (even where the evidence failed to support such a finding), the error of Louisiana's procedure being that if the jury found both elements of first degree murder, i.e., that the accused had a specific intent to kill while engaged in a felony (in this case robbery) the death penalty was mandatory. In contrast, our scheme binds the jury in no such fashion, as it is free to impose life without parole in preference to death, notwithstanding a finding of guilt or captial felony murder charges. Moreover, if the evidence is such that the jury is instructed on lesser included offenses, it may lessen the punishment accordingly as its further option.

Finally, this trial resulted in a lengthy record- nine volumes, 3,311 pages. Counsel for appellants and for appellee, following our rules, have cited and commented on many objections raised below but not argued on appeal. It would be of no value to list them singly as we find no prejudicial errors.

The sentences are affirmed.

NOTE: Because the opinion could not be placed on 8½ X 13" paper it has been retyped verbatim for inclusion in the appendix. The opinion can also be found at Ruiz v. State, ___Ark.___, 617 S.W.2d 6 (June 8, 1981).

OFFICE OF THE CLERK
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ARKANSAS COURT OF APPEALS
LITTLE ROCK

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July 6, 1981

Thomas M. Carpenter
Attorney at Law
807 West Third Street
Little Rock, AR 72201

Re: CR80-147 Paul Ruiz and Earl Denton
v. State of Arkansas

Dear Mr. Carpenter:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

Robin Henderson

Robin Henderson, D.C.

rh

cc: Attorney General

Supreme Court of the United States

No. A-184

PAUL RUIZ AND EARL DENTON,

Petitioners

v.

ARKANSAS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1981

/s/ Harry A. Blackmun

Associate Justice of the Supreme Court of the United States

Dated this 1st

day of September, 1981

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
In the Supreme Court) SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A. D. 19 80, amongst others were the following proceedings, to-wit:

On the 30th day of July, A. D. 19 81, a day of said term October, 1980

PAUL RUIZ & EARL DENTON
APPELLANT

No. CR80-147 vs.

STATE OF ARKANSAS
APPELLEE

Appeal from CONWAY CIRCUIT Court
District

Petition for Stay of Execution is granted, 90 days allowed for filing Petition for Certiorari. George Rose Smith, Purtle and Hickman, JJ.

RECEIVED
JUL 31 1981
LESSENBERRY & CARPENTER
LITTLE ROCK, AR 72201

A-14

IN TESTIMONY, That the above is a true copy of the Order of said Supreme Court, rendered in the case therein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 30th day of July, A.D. 19 81

Dona L. Williams
CLERK

By _____

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to...trial, by an impartial jury of the state and district wherein the crime shall have been committed ....

Amendment VIII, United States Constitution:

> ...nor cruel and unusual punishment inflicted.

Amendment XIV, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

28 U.S.C. § 1257(3):

> Final judgments or decress rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:...(3) By writ of certiorari...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, of where any title, right, privilege, or immunity is specially set up or calimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Ark.Stat.Ann. § 41-1301 (Repl. 1977):

> *Trial of persons charged with capital murder.* The following procedures shall govern trials of persons charged with capital murder:
>
> (1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.
>
> * * *
>
> (3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 [§ 41-1302]; except that, if the state waives the death

penalty, stipulates that no aggravating circumstances exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining the sentence, evidence may be presented to the jury as to any matters relating to any aggravating circumstances enumerated in section 1303 [§ 41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidecne relevant to aggravating circumstances set forth in section 1303 [§ 41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

Ark.Stat.Ann. § 41-1302 (Repl. 1977):

Findings required for death sentence--Unanimity required.

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:

* * *

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

Ark.Stat.Ann. § 41-1351 (Repl. 1977):

Conviction of capital offense--Punishment. A person convicted of a capital offense shall be punished by death by electrocution or by life imprisonment without parole pursuant to Chapter 13 [§§ 41-1301--41-1309] of the Arkansas Criminal Code (Act 280 of 1975).

Ark.Stat.Ann. § 41-1501 (Repl. 1977):

Capital murder. (1) A person commits capital murder if:

(a) acting alone or with one or more persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(c) with the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or

(e) while under sentence of life imprisonment, life imprisonment without parole, or death, he purposely causes the death of another person after premeditation and deliber ation.

Ark.Stat.Ann. § 41-1502 (Repl. 1977):

Murder in the first degree. (1) A person commits murder in the first degree if:

(a) acting alone or with one or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtehrance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(b) with the premeditated and deliberated purpose of causing the death or another person, he causes the death of any person.

(3) Murder in the first degree is a Class A felony.

Ark.Stat.Ann. § 41-901 (Repl. 1977):

Sentence to imprisonment. (1) A defendant convicted of a felony may be sentenced to a term of imprisonment:

(a) not less than five (5) years nor more than fifty (50) years, or life, if the conviction is of a class A felony....

Ark.Stat.Ann. § 41-1101 (Repl. 1977):

Sentence to fine. (1) A defendant convicted of a felony may be sentenced to pay a fine:

(a) not exceeding $15,000, if the conviction is of a Class A or B felony....

Opposition

NO. 81-5523

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

PAUL RUIZ & EARL DENTON — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

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NO. 81-5523

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

PAUL RUIZ & EARL DENTON — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioners' petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the death sentences imposed upon petitioners can state under the Eighth and Fourteenth Amendments to the United States Constitution as set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968)?

2. Whether defendants in a capital murder trial are entitled to voir dire the jury after the guilt phase and before the penalty phase in order to assure due process and trial by an impartial jury?

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioners' convictions is reported at 273 Ark. Adv. Sh. 94, 618 S.W.2d 3 (1981). It is also reproduced in petitioners' appendix at A-1 -- A-11.

SUMMARY

REASONS FOR DENYING THE WRIT

I. The three jurors excused for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968), gave somewhat ambiguous and ambivalent answers to some of the questions posed on voir dire. Although at least one stated at one point that she would "consider" the imposition of the death penalty, all three made it clear that they would not under any circumstances vote to impose the death penalty. The Arkansas Supreme Court reviewed the voir dire and properly held that the analysis of such issues must be made on the overall substance of the voir dire, not on isolated responses, and that it could not rely on the "play on words" urged by petitioners on appeal.

II. Petitioners make a quantum leap from their constitutional right to due process in the penalty phase of a capital murder trial to contend that they are entitled to conduct a second voir dire of the jury between the guilt and penalty phases. Since Arkansas law requires that the same jury sit in both phases, such a procedure would be a mere exercise in futility. It is not constitutionally prohibited for a State to require that the same jury sit in both phases of a capital trial, and, absent some showing of actual prejudice from that statutory requirement, the statute should be presumed to be constitutional. This is merely a novel argument raised by petitioners, with no authority on point.

REASONS FOR DENYING WRIT

I.

THE ARKANSAS SUPREME COURT CORRECTLY HELD THAT THREE JURORS EXCUSED FOR CAUSE MET THE TESTS OF THIS COURT AS SET OUT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), AND ITS PROGENY.

Petitioners allege that the Arkansas Supreme Court incorrectly affirmed the trial court in excusing for cause three jurors on Witherspoon grounds. Had the analysis of the Arkansas Court been as cursory as indicated by petitioners, their argument might be more likely to reflect some merit.

When the entire analysis of the Arkansas Court is reviewed, however, it is clear that the proper test was applied. That analysis appears at Ruiz & Denton v. State, 273 Ark. Adv. Sh. 94, 100-101, 618 S.W.2d 3 (1981), and is reproduced in petitioners' appendix at A-4 - A-6.

While petitioners urged on direct appeal that if a prospective juror ever once uttered the "magic word" that he would "consider" the imposition of the death penalty, that was sufficient to prevent his excusal for cause under Witherspoon, the Arkansas Court correctly held that "(t)o say that one would consider the death penalty but would not vote for it is nothing more than a play on words and fails the test of Witherspoon." The court correctly found that all three jurors demonstrated a clear refusal to vote for the death penalty under any circumstances. This holding is in keeping with this Court's guidelines in Boulden v. Holman, 394 U.S. 478 (1969), in which it elaborated somewhat on the language of Witherspoon and noted that a prospective juror with a "fixed opinion" against the death penalty might be able to "follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." Id. at 484. It would seem to be clear from this language that the State may require that jurors in capital cases be open-minded enough to "consider fairly" all possible punishments in the penalty phase and that no "magic words" will suffice to qualify them if the substance of their responses on voir dire indicates that they would absolutely refuse to vote for the death penalty no matter what the facts or cir-

cumstances of the case.

Although petitioners imply that the Arkansas Court relied solely on the trial court's assessment of the jurors' responses, its standard of review was somewhat more comprehensive and responsible than that. The court noted that it would not apply a review based simply on a juror's single answer or last answer, especially when counsel's questions have a partisan slant. The court chose instead to examine the overall voir dire, noting especially the responses to questions posed by the trial court and based on the guidelines in Witherspoon "as a surer gauge of a juror's willingness to weigh all the penalties of the law against the evidence and vote accordingly." Ruiz, 273 Ark. at 101. While the court did indicate that it would give some deference to the findings of the trial court, which is in a "better position to weight the contradictions jurors often demonstrate," it did not abdicate its duty to review the voir dire of each juror to see if any had been impermissibly excused on Witherspoon grounds.

The general rule in Arkansas with regard to the review of a trial court's excusal of a juror for cause is that such an excusal is within the discretion of the trial court, which will not be reversed absnet an abuse of discretion. Gammel & Spann v. State, 259 Ark. 96, 98, 531 S.W.2d 474 (1976). The Arkansas Supreme Court did not adopt that standard specifically with regard to Witherspoon exclusions; it merely indicated that it would give some weight to the trial court's findings with regard to such exclusions.

Petitioners seem to be asking this Court to grant review in order to hold that prospective jurors giving ambiguous or ambivalent answers may never be excused on Witherspoon grounds. Such a holding would not only be illogical, it would be quite prejudicial to the State, which would be precluded from attempting to clarify a venireman's response. If the State has a right to exclude from juries in capital murder cases those prospective jurors who would never impose the death penalty, as this Court held in Adams v. Texas, 448 U.S. 38 (1980), it has the concomitant right to elicit as explicit an answer as possible from those veniremen in order to determine that jurors' predictions of the options they will give

themselves when considering the proper penalty. If a juror simply refuses to give a totally unambiguous answer or if he continues to contradict himself, depending on whether he is responding to questions from the prosecutor or from defense counsel, the trial court must ultimately determine whether he is properly excludable pursuant to Witherspoon or qualified to serve on the jury.

To argue that any juror who ever gives an ambiguous answer must be allowed to serve is illogical, as such a holding would preclude the State from excluding many jurors who might ultimately reveal themselves to be properly excludable pursuant to Witherspoon. This would lead, in many cases, to the nullifying of the death penalty and possibly to nullification in the guilt phase. That, as this Court has recognized, would be an impermissible result.

Both petitioners and the Arkansas Supreme Court recognize that the three excluded jurors in this case gave ambivalent or ambiguous answers to questions based on Witherspoon. Petitioners merely argue that their interpretation of the voir dire is superior to that of the trial court and the Arkansas Supreme Court. The trial court was required to interpret the responses in light of Witherspoon and make a finding about the seating or exclusion of each juror. The Arkansas Supreme Court was then required to review that finding, again applying the principles of Witherspoon and its progeny. Respondent submits that neither of these courts erred in applying the law as set forth by this Court, and certiorari should not be granted on this issue.

II.

THE DUE PROCESS REQUIREMENTS OF THE SIXTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT A DEFENDANT IN A CAPITAL MURDER CASE BE ALLOWED A SECOND VOIR DIRE OF THE JURY PRIOR TO THE PENALTY PHASE.

Petitioners argue in their second point in support of their petition that defendants in capital murder cases are entitled to due process pursuant to the Sixth and Fourteenth Amendments to the United States Constitution in the penalty phase, as well as in the guilt phase, of a capital murder trial. In light of this Court's holdings in cases cited by petitioners, respondent obviously has no argument with this basic premise.

Petitioners then argue that due process requirements should be applied to afford a capital murder defendant the right to voir dire the jury a second time after the guilt phase and prior to the penalty phase in order to determine whether the jurors are still impartial and open-minded. They cite no authority for the proposition that due process as applied to the penalty phase has been extended this far by this Court or any other court, and respondent knows of no holdings to that effect.

In reaching this issue on direct appeal, the Arkansas Supreme Court noted that Ark. Stat. Ann. §41-1301(3) (Repl. 1977) requires that the same jury sit in both phases of a capital trial. The Arkansas Court noted that it had previously held this statutory requirement to be constitutional and that the granting of petitioners' motion at trial would thus have served "no useful purpose except to prolong the trial." It also impliedly held that petitioners' argument, for all its "freshness," did not present any issues or ideas justifying what would ultimately result in "a major disruption in the statutory scheme of capital trials under Arkansas law." Ruiz & Denton v. State, 273 Ark. Adv. Sh 94, 103-104, 618 S.W.2d 3 (1981).

This Court has apparently never reached the issue of whether a State may constitutionally require by statute that the same jury sit in both phases. Respondent can imagine some instances in which the Court could find that the application of such a statute might conceivably deprive a defendant of some constitutional right. This is not, however, one of those instances. As noted by peti-

tioners, there is no provision for voir dire prior to penalty in other types of cases. They further point out that the qualitative difference in the imposition of the death penalty requires that different standards may be applied in capital cases. Again, respondent has no quarrel with that basic premise. These petitioners have simply been unable to demonstrate any deprivation of constitutional rights as the State statute was applied.

Since this Court has not held otherwise, it must be presumed that a State may constitutionally require that the same jury sit in both phases of a capital murder trial, especially where no constitutional deprivation is demonstrated. There is certainly no authority for the proposition that a State may not impose the death penalty under such a procedure.

It should also be noted that this Court has upheld the constitutionality of the death penalty statutes of various states which also provide for a bifurcated procedure requiring that the same judge or jury that determines guilt also determine penalty. See, e.g., Gregg v. Georgia, 428 U.S. 153, 162 (1976).

The only argument petitioners can make in support of their proposition is that some jurors may have formed some sort of prejudice against the defendant after hearing all the evidence against him in the guilt phase. Without prejudice, they reason, how could the jury find guilt? They allege that there is obviously some prejudice against a defendant if the jury finds him guilty and that prejudice obviously follows him into the penalty phase. Respondent is not aware that finding a defendant guilty beyond a reasonable doubt is tantamount to prejudice. Supposedly, the jury's finding as to guilt is based on properly presented (and constitutionally limited) evidence regarding the crime at issue. That verdict is presumed to be the result of numerous findings of fact, or, if you will, the ultimate "truth" gleaned from the evidence presented. Such findings cannot logically be equated to prejudice against the defendant, since "prejudice" means an opinion formed before the facts are known.

The logical (?) extension of petitioners' argument is that the jury should be precluded from considering during the penalty phase

some of the information learned about the defendant or his crime during the guilt phase. While this might certainly work to a defendant's benenfit in a case of a particularly heinous crime, respondent sees no logic in having the penalty determined by a jury that is ignorant of the basic facts of the case. This Court has stressed that the jury should have available all relevant information about the defendant and his crime in determining penalty. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978). While most of the cases on this issue deal with the defendant's right to have mitigating evidence presented, the State has a concomitant right to a fair trial on the penalty issue, Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), which must necessarily include a jury knowledgeable about the facts of the case.

Although petitioners present a creative argument, it is neither logical nor underpinned by sufficient authority for this Court to give it serious consideration. They have not shown that the decision of the Arkansas Supreme Court does not comport with this Court's interpretation of constitutional requirements in the imposition of the death penalty, and they certainly have not presented any compelling reasons why this Court should grant certiorari on this issue.

CONCLUSION

The Arkansas Supreme Court followed this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny in holding that three jurors were properly excused for cause because of their refusal to vote to impose the death penalty. A writ of certiorari should not be granted on the first question raised by petitioners because there is no question of law sufficient to meet the criteria of Rule 17 of this Court.

Petitioners have not shown that the question presented in Point II meets any of the criteria of Rule 17 or that it raises any issue worthy of this Court's consideration and review. The Arkansas Supreme Court's decision on this issue

is not in conflict with any decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victra L. Fewell, Assistant Attorney General, do hereby certify that three copies of the foregoing Response to Petition for Writ of Certiorari to the Arkansas Supreme Court has been served on petitioners herein by mailing a copy of same, postage prepaid, to Thomas M. Carpenter, Lessenberry & Carpenter, 807 West Third Street, Little Rock, Arkansas, 72201, this 4th day of November, 1981.

Victra L. Fewell
VICTRA L. FEWELL